No. 12709

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES NELS EKBERG,
Appellant,

v.

RICHARD A. McGEE, ET AL.,
Appellees.

BRIEF FOR APPELLEES

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STATEMENT OF THE CASE

The appellant herein transmitted to the Honorable William Denman, Chief Judge of the United States Court of Appeals for the Ninth Circuit, an application for a writ of habeas corpus. Judge Denman, pursuant to 28 U. S. C., 2241(b), transferred said application to the United States District Court for the Northern District of California (Tr. 47). The Honorable Dal M. Lemmon, judge of said court, by an order filed July 31, 1950, denied to appellant the right to file the petition *in forma pauperis* on the ground that there was nothing alleged therein which presented "exceptional circumstances of peculiar

urgency," which entitled him to the issuance of the writ (Tr. 48).

On August 18, 1950, appellant filed an application for certificate of probable cause and appeal from the order denying hearing and issuance of a writ of habeas corpus and the denial of the right to file the petition for a writ of habeas corpus and to proceed *in forma pauperis* (Tr. 54-55). Thereafter, and on August 24, 1950, a document entitled "Assignment of Errors" was filed by appellant in the United States District Court for the Northern District of California (Tr. 56-57), as well as a praecipe for the certified records (Tr. 58-59).

On September 27, 1950, Honorable Dal M. Lemmon, United States District Judge, ordered that the time for docketing the appeal in the Court of Appeals for the Ninth Circuit be extended to and including the twenty-seventh day of October, 1950 (Tr. 60). Thereafter, and on October 12, 1950, the record in the above matter was filed with this court.

APPELLANT'S SPECIFICATIONS OF ERROR

The opening brief of appellant adopts as the specifications of error, the points raised in the previous documents filed by appellant, namely, in the petition for writ of habeas corpus, and brief "as supplement to and in support of appeal of the petition for the writ of habeas corpus ad subjiciendum, ad testificandum."

These grounds may be summarized as follows: (1) The alleged prior conviction with which the petitioner and appellant was charged was not a valid conviction and the trial court therefore lacked juricdiction; (2) there was insufficient evidence to justify petitioner and appellant's conviction pursuant to Section 476a of the Penal Code of the State of California, and there was insufficient evidence before the committing magistrate to justify petitioner and appellant's being held for trial; (3) the joinder of two separate informations for trial resulted in the denial to petitioner and appellant of due process of law; (4) petitioner and appellant was deprived of counsel of his own choice and his counsel was grossly incompetent; (5) he was denied defense witnesses, which resulted in the denial of due process of law as to appellant; (6) he was placed twice in jeopardy for the same offenses; and (7) he was denied an opportunity to appear in person and argue his cause by the District Court of Appeal of the State of California, and denied the right to have counsel appointed to represent him on his appeal, which resulted in a lack of due process.

ARGUMENT

I. The Procedure Followed by the District Court in Denying the Petition Without a Hearing Was Proper Under the Statutes

In the case of *Dorsey* v. *Gill,* 148 F. 2d 857 (cert. denied 325 U. S. 890) the United States Court of Appeals for the District of Columbia, examined at

great length the office and nature of a writ of habeas corpus and the procedure to be followed in federal courts upon an application therefor. The opinion, which is exhaustively annotated, summarized the procedure which may be followed by a district court on a petition for the issuance of a writ of habeas corpus and states (pp. 865-866):

> "There are at least ten such possible alternatives, as follows: (1) When a petition is presented to a judge with a request for leave to file it, the judge may, if the petitioner is not entitled to a writ, deny leave to file it; or (2) he may in the interest of justice—if the petition is insufficient in substance—require petitioner to amend it; or he may require him to show—if the judge is not otherwise informed—whether petitioner has made a prior application and, if so, what action was had on it; (3) he may issue a rule to show cause why leave to file a petition for writ of habeas corpus should not be granted and upon the return, may grant or deny leave to file; (4) after a petition has been filed, if it satisfies the requirements of the statute, the judge should issue the writ forthwith; (5) if, upon consideration of a petition which has been filed, it appears that the petitioner is not entitled to the writ, the court should refuse to issue it; (6) if the allegations of the petition are inconclusive, the judge may issue a rule to show cause why a writ should not be granted, to which the relator may respond; (7) if the procedure suggested in (6) is followed, the facts on which the opposing parties rely having been exhibited to the judge, he may find that no issue of fact or law is

involved and may then refuse to grant the writ, in which event it is not necessary to hold a hearing; (8) on the other hand, if the procedure suggested in (6) is followed, the judge may find that the facts admitted—in response to the order to show cause—entitled the petitioner to the writ and to a discharge, forthwith, as a matter of law; or (9) he may find that an issue is involved; in which event he should grant the writ and require a hearing, the petition and traverse being then treated as, together, constituting the application for the writ, the return to the rule as setting up the facts thought to warrant its denial, and the issues of fact, thus emerging, should be tried as required by that statute; (10) if, as a matter of convenience, the judge—without determining whether the petition is sufficient—issues the writ, he may then, upon the return, hear and dispose of the whole matter at once."

From the record of the proceedings heretofore had in this matter (*People* v. *Ekberg,* 94 Cal. App. 2d 613; 211 P. 2d 316) and of which this court may take judicial notice (*Knight* v. *People,* 60 F. Supp. 164), it appears that defendant was charged in the state courts with the crime of issuing a check without sufficient funds with intent to defraud. In a separate action he was charged with the crime of possession of a firearm capable of being concealed upon the person of one previously convicted of a felony. He pleaded not guilty and not guilty by reason of insanity in each action. At his request the actions were consolidated for trial and tried together. A jury found

him guilty on both charges and later the same jury found him sane at the time each of the offenses was committed. Separate judgments were entered. The appellant herein was represented by counsel at the time of the trial but filed an appeal in *propria persona* only under the number of the cause involving the possession of a firearm. However, his argument that he intended to appeal in both cases was allowed by the court and both matters were considered (*People* v. *Ekberg,* 94 Cal. App. 2d 613, 211 P. 2d 316).

After a complete review of the case, the District Court of Appeal of the State of California, in and for the Fourth Appellate District, affirmed the judgment on November 14, 1949. Thereafter, a petition for rehearing was filed with said court, which was denied on November 26, 1949, and a petition for hearing was denied by the Supreme Court of the State of California on December 12, 1949 (*People* v. *Ekberg,* 94 Cal. App. 2d 613, 619, 211 P. 2d 316). No petition for certiorari was filed with the United States Supreme Court seeking a review of this matter.

On February 15, 1950, appellant herein filed a petition for writ of habeas corpus with the California Supreme Court, which was numbered therein Crim. 5086, in which the same points as presented herein were sought to be raised. This petition was denied without opinion by the California Supreme Court on March 16, 1950. Thereafter appellant filed a petition for certiorari with the United States Supreme Court, which was denied on June 9, 1950 (339 U. S. 969).

The petition on its face in the instant matter presents no grounds which have not been presented hitherto in the actions filed by appellant and no grounds which were not within his knowledge at the time of the original appeal in the State courts.

Salinger v. *Loisel,* 265 U. S. 224, 230, 44 S. Ct. 519;
Darr v. *Burford,* 339 U. S. 200, 70 S. Ct. 587.

It is apparent that it does not comply with the provisions of Section 2244, Title 28, United States Code. (Set forth in Appendix.)

Under the provisions of Section 2254, Title 28, United States Code:

> "An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> "An applicant shall not be deemed to have exhausted the remedies available in the courts of the State within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

It would appear that notwithstanding the order of the United States District Court in this matter that the appellant herein has not exhausted the remedies available through the state courts. Appellant still

has the right to raise all points attempted to be presented, in the courts of California by means of a petition for writ of habeas corpus which is an available state corrective process.

Limiting the Abuse of Habeas Corpus, 8 F. R. D. 171, 176-7;

Smyth v. *Stonebreaker* (4 Cir.), 163 F. 2d 498, 501.

There is no showing made on the face of the petition that there were any circumstances rendering such process which is available in the courts of California ineffective to protect the rights of the prisoner.

Darr v. *Burford,* 339 U. S. 200, 70 S. Ct. 587.

In the recent case of *In re Swain* (1949), 34 Cal. 2d 300, 209 P. 2d 793, in denying a petition for writ of habeas corpus to secure the release of a prisoner from custody, the California Supreme Court stated:

> "It should be noted that no question of the abuse of the writ of habeas corpus is before us (cf., *Price* v. *Johnston* (1947), 334 U. S. 266, 286 (68 S. Ct. 1049, 92 L. Ed. 1356)), and that our determination that the vague, conclusionary allegations of the present petition are insufficient to warrant issuance of the writ is not a ruling on the merits of the issues which petitioner has attempted to raise (cf., *Pyle* v. *Kansas* (1942), 317 U. S. 213, 216 (63 S. Ct. 177, 87 L. Ed. 214); Williams v. Kaiser (1944), 323 U. S. 471 (65 S. Ct. 363, 89 L. Ed. 398); *Tompkins* v. *Missouri* (1944), 323 U. S. 485 (65 S. Ct. 370, 89 L. Ed. 407); *Rice* v. *Olson* (1944), 324 U. S. 786 (65 S. Ct. 989, 89 L. Ed. 13677)). We are entitled to and we do

require of a convicted defendant that he allege with particularity the facts upon which he would have a final judgment overturned and that he fully disclose his reasons for delaying in the presentation of those facts. This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation."

It should be noted that appellant herein did not petition the United States Supreme Court for certiorari from the decision in *People* v. *Ekberg,* 94 Cal. App. 2d 613, 211 P. 2d 316, and each of the points raised in the instant petition could have been brought to the court's attention on the original appeal from the judgment of conviction.

Petitioner, herein, in both his petitions in the state courts and in the federal courts has resorted to vague conclusions and accusations unsupported by facts and the United States District Court did not err in denying him the right to file such a petition.

Tate v. *Heinze* (9 Cir.) No. 12711, decided Jan. 30, 1951.

II. The Allegations of the Petition for Writ of Habeas Corpus Were Insufficient as Grounds for the Issuance of a Writ

Although appellant herein was represented by counsel at the trial of his original action, on the appeal

in the state courts and in the habeas corpus proceedings he appeared in *propria persona.* On this appeal, however, counsel has been appointed by this court to represent him.

The majority of the points raised in the petition for writ of habeas corpus filed in this court and the supplemental briefs in support thereof have previously been considered by the state courts and have been held to be without merit.

In *Darr* v. *Burford,* 339 U. S. 200, 218, 70 S. Ct. 587, 597, the United States Supreme Court stated:

> "A conviction after public trial in a state court by verdict or plea of guilty places the burden on the accussed to allege and prove primary facts, not inferences, that show, notwithstanding the strong presumption of constitutional regularity in state judicial proceedings, that in his prosecution the State so departed from constitutional requirements as to justify a federal court's intervention to protect the rights of the accused. The petitioner has the burden also of showing that other available remedies have been exhausted or that circumstances of peculiar urgency exist."

Appellant contends that the judgment and commitment under which he is now confined in Folsom State Prison, California, is void on the various grounds set forth and summarized in the Specification of Errors, *supra* (p. 11).

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR

With relation to appellant's first contention that the trial court had no jurisdiction because the allegation in the information as to his prior conviction was not sustained, this point was fully considered by the District Court of Appeal of the State of California, in and for the Fourth District, in *People* v. *Ekberg,* 94 Cal. App. 2d 613, 617-18, 211 P. 2d 316, wherein the court stated:

> "The information charged that the appellant had previously, on April 24, 1942, been convicted of a felony, 'Impersonation of a U. S. Officer,' with imprisonment under certain numbers in Leavenworth and Atlanta prisons, and that this judgment had never been reversed or set aside. It is now contended that this charge was not sustained, and that the charge of a former conviction is 'illegal and void' since it developed at the trial that this former judgment had actually been reversed in the case of *Ekberg* v. *United States,* 167 F. 2d 380. When the district attorney attempted to introduce evidence that the appellant had been previously convicted as alleged in the information appellant's counsel stipulated that he was so convicted, and the appellant personally joined in this admission. It was then stipulated that the appellant was, on April 24, 1942, in the United States District Court at Puerto Rico, convicted of the crime of felony, to wit, impersonation of a United States officer; that judgment was pronounced on that date; that the appellant served a term of imprisonment in the United States penitentiary at Leavenworth and at

Atlanta; and 'that said judgment has never since been reversed, annulled or set aside.' An objection to the introduction of evidence to establish these facts was then made on the ground that the facts had already been established, and was sustained. At the close of the appellant's evidence, he himself tried to raise the contention that the case above cited had reversed his conviction. His counsel assured the judge that he had read this case, that there was only a partial reversal for an error in giving consecutive sentences under different counts, that there was nothing at all wrong with one sentence, and that what happened in connection with that reversal had 'not a thing' to do with the issue presented in this case. There is nothing in the case cited which would have the effect here contended for, and the defendant is bound by the stimulations and admissions which were made. It is further contended, in this connection, that the jury should have been advised that the defendant had served an extra period of imprisonment and probation under that former conviction, as was developed after a part of the judgment was reversed. This was not material to any issue here and no error appears in that connection."

With relation to the second point raised—that the information failed to charge an offense under the provisions of California Penal Code, Section 476a, that the evidence was insufficient to support the verdict, and that the committing magistrate was without jurisdiction to hold petitioner—these points were fully covered by the District Court of Appeal of the

State of California, in and for the Fourth Appellate District (*People* v. *Ekberg,* 94 Cal. App. 2d 613, 615-16), wherein it is stated:

"The general facts relating to these cases are as follows. On the afternoon of February 14, 1949, the appellant entered Hancock's Flower Shop in San Diego, represented himself to be connected with the TWA Airlines, and ordered three orchid corsages saying they were for airline hostesses. He also placed a telegraph order for flowers to be delivered to his wife in Kansas City, giving her correct address. In payment therefor he wrote a check for $19.82 on a Los Angeles bank. He then stated that the address he had placed on this check was wrong and at his request Hancock tore up that check, and filled out another check on the same bank, with a different address. Both of these addresses were fictitious. The appellant signed the second check and left the store taking the three boxed orchids with him. Hancock saved the pieces of the first check. Having become suspicious, he phoned the Los Angeles bank and learned that the appellant had no account there, a fact which was conclusively established at the trial.

"About 2:30 a.m. on the morning of February 15, 1949, the appellant, while in a grill in San Diego, displayed a pistol in a manner which alarmed the cashier. She called the police and when they arrived they found a .380 Colt automatic pistol under the appellant's belt and covered by his coat. At that time there was no clip in the gun or shell in the chamber. However, a clip for the gun was found in his pocket. The appellant

told the officers that he had bought the gun a good many years ago.

"A number of points first raised by the appellant are to the effect that the evidence is not sufficient to sustain the verdict and judgment as to either charge. With respect to the check charge, it is argued that the evidence discloses that Hancock was not deceived or defrauded since he knew that the check was no good and did not send the flowers to the appellant's wife, and since he knew that the appellant was too drunk to know what he was doing; that Hancock did not endorse or deposit the check or deliver the flowers since he knew before he took it and before the appellant left the store that it was worthless; and that the check was actually presented to the bank by a notary public, and went to protest, some 30 days after the information was filed in that case. These contentions are based upon a part of the evidence and inferences the appellant would draw from portions thereof. There is, however, ample evidence as to every element essential to this charge. While Hancock's testimony discloses that he became suspicious and had some doubts about the matter before the appellant left the store, it also appears that he did not know that the check was not good, that he did not want to accuse the appellant in that manner, and that 'I thought it was all right.' Not only is this interpretation of his testimony a reasonable one, but it is supported by the fact that he permitted the appellant to leave with the boxed orchids, the main part of the purchase. His failure to send the remaining flowers to the appellant's wife occurred later, after

he had learned that the check was worthless. While Hancock admitted that the appellant appeared to him at the time to be 'pretty well inebriated' and not 'in too good condition,' the evidence is far from showing that the appellant was so drunk that he did not know what he was doing or that Hancock was aware of any such fact. The appellant was able to write out the first check, giving the false address thereon, to instruct Hancock to fill out another check with a different false address upon it, and to give his wife's correct name and address in Kansas City. Moreover, it is the appellant's intent which is the most important consideration. The actual presentation of the check by Hancock was unnecessary, under the circumstances, and it was presented by the notary about two weeks before the information was filed. These were questions of fact for the jury and its findings thereon are sufficiently supported by the record.

"With respect to the possession of a firearm charge it is argued that the alleged weapon was not a 'deadly weapon' since it was 'in diassembled form,' with 'parts missing,' and without bullets or cartridges. Section 2 of what is known as the 'Dangerous Weapons' Control Law' (Stats. 1923, p. 695; 1 Deering's Gen. Laws, Act 1970) forbids the possession of certain firearms by one who has been convicted of a felony under the laws of the United States, of the State of California or of any other state or country. There is no evidence that any part of this automatic pistol was

missing. While the clip was not in the gun the appellant had it in his pocket. The appellant concedes that the barrel of this gun was less than 12 inches in length, and it was stipulated at the trial that the weapon was 'capable of being fired,' and that it was meant thereby that if a shell had been in the gun at the time the gun would properly discharge the shell. The evidence is sufficient in this respect."

It has long been the settled rule that the writ of habeas corpus cannot be used for the purpose of proceedings in error and that the sufficiency of the evidence to support the conviction may not be inquired into under the writ.

Burall v. *Johnson,* 134 Fed. 2d 614, cert. den., 63 S. Ct. 1327, 319 U. S. 768, Rehearng Den., 64 S. Ct. 30, 320 U. S. 810, Rehearing Den., 64 S. Ct. 187, 320 U. S. 812;
Sunal v. *Large,* 332 U. S. 174, 67 S. Ct. 1588;
Frank v. *Mangum,* 237 U. S. 309, 35 S. Ct. 582.

With relation to appellant's contention that he was deprived of counsel of his own choice or that his counsel was incompetent, it is apparent to this court that this point could have and should have been raised on appeal from the original judgment. Moreover, there are no facts set forth which would tend to disclose the truth of this allegation or show that at any time petitioner raised this matter in his original proceedings in the state courts.

With relation to appellant's contention that he was denied the presence of defense witnesses because of

the incompetency of his counsel, it is apparent that the failure of counsel to present evidence does not constitute a denial of due process of law and the competency or incompetency of counsel is a question of fact to be passed on by the trial court.

With relation to petitioner's contention that he was twice in jeopardy for the same offense in that the court ordered consolidated the trial on the information for violation of California Penal Code, Section 476a, and the trial for the possession of a firearm capable of being concealed upon the person of one previously convicted of a felony the record shows that this consolidation was made at the request of the appellant herein and he may not now attack such joinder (*People* v. *Ekberg,* 94 (A. 2d 613, 211 P. 2d 316)). Moreover, the question of joinder is regulated by the law of the State and the Fourteenth Amendment does not control mere forms of procedure in the state courts or regulate the practice therein.

Holden v. *Hardy,* 169 U. S. 366, 18 S. Ct. 383;
Hurtado v. *State of Cal.,* 110 U. S. 516, 4 S. Ct. 111;
People v. *Burton,* 91 C. A. 2d 695, 205 P. 2d 1065, Cert. Den. 338 U. S. 886;
Bundte & Phillips v. *People of the State of Cal.,* 87 C. A. 2d 735, 197 P. 2d 823, Cert. Den. 337 U. S. 915.

As to appellant's contention that he was not afforded a probation hearing and that judgment and

sentence were improperly imposed, this point is covered in the district court of appeal's decision in *People* v. *Ekberg,* 94 Cal. App. 2d 613, at 618-19, wherein the court states:

"The court did not refuse to consider an application for probation. Aside from the fact that the appellant was ineligible for probation, he waived an application for probation immediately after the verdicts were returned on the insanity issue. The facts which the appellant insists could have been brought to light through a probation hearing were fully brought out in a statement made to the court by appellant's counsel. The appellant was not without counsel when judgment was pronounced. Judgment was purportedly pronounced on May 17, with his regular counsel present. It was discovered that he had not been properly arraigned for judgment and, on May 18, this proceeding was set aside and judgment again pronounced. At that time appellant's regular counsel was unable to be present and he was represented by another counsel, with his consent expressed in open court. Bias is attributed to the trial judge in that he remarked that he thought the appellant should have pleaded guilty to these charges. This occurred just before sentence was pronounced and while the judge was reviewing the facts in response to counsel's plea for leniency. The judge referred to appellant's attitude in court and to his record, including more than 50 arrests with 14 of them on charges of a serious nature. In commenting thereon, the judge stated that if the appellant had had the proper attitude of humility he would

have pleaded guilty to these charges. Neither prejudice, bias nor error appears. Complaint is further made that appellant did not receive the transcript in this matter, at the state prison, until more than 90 days after notice of appeal was filed. Because of the situation which developed, this court twice extended the time for filing appellant's opening brief, it was then filed on time, and no prejudice appears."

See:

Williams v. *N. Y.,* 337 U. S. 241.

Appellant's further contention that he was not afforded a proper appeal in that his request to be personally present and argue the matter in the District Court of Appeal was denied as was his request for the appointment of counsel to argue said matter, is without merit. The assistance of counsel on appeal or the right of the petitioner and appellant to be personally present and argue the matter is a question within the discretion of the appellate court and the appellant as a matter of right is not entitled to be produced. The refusal of this right does not involve a lack of due process of law.

Price v. *Johnson,* 334 U. S. 266.

Appellee submits that whereas in the instant matter the allegations of the petition are not supported by facts and the majority of the points raised have been considered by the state courts and the United States Supreme Court has denied certiorari, in the

absence of exceptional circumstances of peculiar urgency the district court in the exercise of its discretion may deny the petitioner the right to file such petition.

Dorsey v. *Gill,* 148 Fed. 2d 857, Cert. Den. 325 U. S. 890;
Boyd v. *O'Grady,* 121 Fed. 2d 246, 147;
Edmondsen v. *Wright,* 177 Fed. 2d 719;
Holiday v. *State of Maryland,* 177 Fed. 2d 844;
Holland v. *Eidson,* 90 F. Supp. 314;
U. S. v. *Burke,* 90 F. Supp. 868.

It is respectfully submitted that the language of this court in the decision in *Tate* v. *Heinze* (9 Cir.), No. 12,711, decided January 30, 1951, is directly applicable to the case at bar:

"Unquestionably, petitioner was justly convicted, and the sentence under the state Habitual Criminal Act was justified. In view of the fact that there is no merit in the present petition, the petition to file forma pauperis should have been denied without hesitation. We only comment that there was no ground for a certificate of probable cause for appeal. The only reason why such a certificate is justified is the abuse of this process, which has been engendered by some appellate rulings."

Appellee respectfully submits that the order of the district court denying the right to file the petition

for writ of habeas corpus in the present matter should be affirmed and the appeal dismissed.

Dated: Sacramento, California, February 5, 1951.

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APPENDIX

U. S. Code, Title 28, Sec. 2244

No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States, or of any State, if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus and the petition presents no new ground not theretofore presented and determined, and the judge or court is satisfied that the ends of justice will not be served by such inquiry.

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